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No. 96-1452

In The

Supreme Court of the United States

October Term, 1996

STATE OF COLORADO and VICTORIA BUCKLEY,
in her official capacity as SECRETARY OF STATE,
Petitioners,

v.

JENNIE SANCHEZ, ADELINE SANCHEZ and
DEBRA CASANOVA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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EDITOR'S NOTE

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Tenth Circuit committed reversible error in holding that the configuration of Colorado House District 60 ("HD 60") violates § 2 of the Voting Rights Act, where

(a) the court concluded, based on its review of population data and of maps of alternative districts and of other districts approved in Colorado, that Hispanics in south central Colorado are sufficiently large and geographically compact to comprise a majority in a legislative district;

(b) all statistical experts involved in the case, including an independent consultant hired by the Colorado Reapportionment Commission at the time HD 60 was drawn, agreed that Anglos and Hispanics in the area consistently vote for different candidates;

(c) no Hispanic has been elected to the legislature from this area since at least 1940, despite a large Hispanic population; and

(d) Petitioners failed to offer any credible reasons under the totality of circumstances explaining away the results of racial bloc voting.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents submit this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

This is a voting rights case unique to the vast expanses and towering mountains of the Rocky Mountain West. Respondents are Hispanic voters residing in Colorado House District 60 ("HD 60"), which encompasses 10,725 square miles, an area larger than many states. HD 60 is sliced on the east and west by two of the highest mountain ranges in North

America, the Continental Divide, which winds back and forth across HD 60's western boundary, and the Sangre de Cristo Mountains, with their 14,000-foot peaks. Pet. App. A-3, A-8. The San Luis Valley (the "Valley"), which provides about 80% of HD 60's population, lies between these two ranges. *Id.* A-3, A-7. Substantial parts of two of the eight counties included within HD 60 (Saguache and Mineral) lie on the western slope of the Continental Divide, and all of Huerfano and Las Animas Counties sit on the eastern side of the Sangre de Cristos. *Id.* A-8. One can reach the portions of HD 60 located west of the Divide only by crossing 10,000-foot passes. The eastern portion of HD 60 is connected with the rest of the District by a single pass traversing the Sangre de Cristos. Pet. App. B-14.

No Hispanic has been elected to the Colorado General Assembly from the Valley since 1940, despite the fact that Hispanics comprise a substantial minority of the population--currently 45.41% of the population in HD 60. Pet. App. A-8, A-35. During that time, ten Hispanic candidates have sought to represent all or part of the San Luis Valley in the State House of Representatives, yet not one was elected. PX-8.[1] In the face of a history of racially-polarized voting and "overwhelming" evidence of socioeconomic disparities, Pet. App. A-29 - 41, A-46 - 47, Hispanics have been unable to elect a candidate of their choice. Sadly, the current incumbent has referred to his Hispanic constituents as "wetbacks" during legislative hearings and justifies the term "as just how we talk down there." *Id.* A-49; PX-42, PX-43.

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[1] References to portions of the record not contained in the appendices of Petitioners or Respondents are cited as follows: plaintiff's exhibits: "PX-__"; defendants' exhibits: "DX-__"; trial transcript: "Tr. at __"; orders or papers on file with the district court: "Doc. no. __."

Course of Proceedings.

Respondents filed the underlying action alleging that, as drawn, HD 60 violates § 2 of the Voting Rights Act (the "VRA"), 42 U.S.C. § 1973. Following a bench trial, the district court dismissed the action. Pet. App. B. After hearing oral argument, the United States Court of Appeals for the Tenth Circuit placed the case in abeyance for six months pending this Court's resolution of *Bush v. Vera*, 116 S. Ct. 1941 (1996), and *Shaw v. Hunt*, 116 S. Ct. 1894 (1996) ("*Shaw II*"). The parties then submitted supplemental briefs discussing the ramifications of those decisions for the present case.

Thereafter, a unanimous panel of the Tenth Circuit issued a comprehensive decision (Pet. App. A-1 - 60) reversing the district court, finding a violation of § 2 of the VRA, and remanding the case to the district court with directions to order the State to implement a remedial plan of redistricting. The decision analyzed each of the three threshold factors set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and then engaged in a comprehensive canvassing of the totality of circumstances, examining each of the factors proffered by either side and other relevant factors. It was written by a former Colorado Attorney General. The State sought rehearing by the panel and *en banc*, which was unanimously rejected. Pet. App. C.

Statement of Facts.

As part of the 1992 redistricting process, the Colorado Reapportionment Commission hired an election analysis consultant, Election Data Services ("EDS"). Pet. App. A-5. EDS performed an analysis of local elections that included all

but one of the counties in current HD 60. *Id.* A-5 - 6.[2] Because the Petition at 4 mischaracterizes this report, the most pertinent conclusions are quoted here:

- "Voting in the San Luis Valley appears to be racially polarized, with whites and Hispanics preferring different candidates. This is true in almost every election contest examined in which a Hispanic candidate competed in 1988 and 1990."

- "[D]istricts in which Hispanics comprise approximately 50 percent of the voting age population may be required to permit Hispanics [in the San Luis Valley] the opportunity to elect candidates of their choice. It is necessary to create districts that are more heavily Hispanic in the San Luis Valley than elsewhere in the state because of the degree of racially polarized voting found in this area of the state."

Pet. App. at H-2 - 3.

In response to this report, the Commission preliminarily drew a plan (the "Ventura Plan") for HD 60 that included a 48.8% Hispanic population, Pet. App. I-3, Resp. App. A, and considered at least one other plan with a 50% or more Hispanic population, Pet. App. I-3. Although the Ventura Plan was compact by any standard, it was not adopted. In a sharply-divided vote,[3] the Commission eschewed the recommendation of EDS, its own expert consultant, that a 50% Hispanic district

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[2] Mineral County, which in 1990 had only 27 Hispanic residents, was not included.

[3] Although the Commission was "multi-ethnic," Pet. at 3, its only two minority members voted against the current HD 60. PX-18 at 2590.

was required. Pet. App. A-51. Accordingly, the final plan included HD 60 as currently drawn with only a 45.41% Hispanic population and 42.38% Hispanic voting age population.[4] In the 1992 election, an Hispanic candidate for the HD 60 seat again lost to an Anglo, repeating the pattern that has persisted for nearly six decades. *Id.* A-8. As discussed below, the voting was racially polarized.

The State's trial expert, Dr. Zax, conceded that Anglos and Hispanics in HD 60 support different candidates. Pet. Apps. A-32 - 33, P-2, and P-6. That conclusion confirmed the racial polarization findings of EDS. Dr. Zax also conceded that in an all-Anglo precinct in HD 60, an Hispanic candidate running against an Anglo would always lose, regardless of whether running as a Republican or Democrat. Pet. App. A-34.

Respondents' expert, Dr. Bardwell, also confirmed EDS' statistical findings. His examination of the last three races in which an Hispanic ran against an Anglo for the HD 60 seat show high percentages (86-89%) of Hispanics voting in favor of Hispanic candidates for HD 60, and similarly high proportions (83-90%) of Anglos voting to defeat those candidates. Pet. App. A-31. Dr. Bardwell's analysis of a number of "exogenous" elections, *i.e.*, elections for offices

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[4] In return for the support of the San Luis Valley Chapter of the Hispanic League to keep the Valley in a single district, the San Luis Valley County Commissioner Association condemned racial bloc voting and resolved to establish policies that would ensure full political participation by Hispanics. Pet. App. A-6 - 7. However, no such policies were adopted, Tr. at 721-22, 997, and the pattern of racially-polarized voting was repeated in the 1992 election. Pet. App. A-31. Following that election, the San Luis Valley Chapter of the Hispanic League conducted a series of public hearings throughout the Valley, which culminated in a balloting in which its members voted to support this lawsuit. PX-88; Tr. at 142-45. Respondents' appeal to the Tenth Circuit Court of Appeals was supported by the Colorado Hispanic Bar Association and the Pueblo Chicano Democratic Caucus as *amici curiae*.

other than state representative within the area encompassing HD 60, confirmed these high levels of polarization. Pet. App. A-31 - 32.

Respondents also presented evidence establishing that the Hispanic population in this area is sufficiently large and geographically compact to form a majority in a legislative district, which evidence included both population statistics and maps of alternative districts. Pet. App. A-24 - 25. Finally, both lower courts found substantial socioeconomic disparities between Anglos and Hispanics in HD 60, in terms of education, income, unemployment, and poverty rates. Pet. Apps. A-46 - 47 and B-26. The cumulative result of these disparities has taken its toll; in the 1992 HD 60 election, Hispanic turnout was 10% less than Anglo turnout. PX-59 at 142; PX-71 at 4-6; Tr. at 413.

Based on its "comprehensive, not limited, canvassing of relevant facts," Pet. App. A-15, A-43, the Tenth Circuit concluded that Respondents "established under the totality of circumstances the presently configured HD 60 unlawfully dilutes the voting strength of Hispanic voters in south central Colorado." *Id.* A-2 - 3.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision does not raise the issues the State presented in its Petition. The Petition distorts the decision below in an effort to construct non-existent conflicts with the decisions of this Court and other circuits. In fact, the court of appeals thoughtfully analyzed each of the *Gingles* factors and then comprehensively canvassed the totality of circumstances, including all of the factors presented by the State. Thus, the State's true quarrel is with the Tenth Circuit's application of

well-established legal principles, not with the principles themselves.

Moreover, the Tenth Circuit's decision is not yet fully ripe for review. The case is currently pending in the district court, awaiting the development of a remedial plan by the State. The plan ultimately drawn may moot some or all of the State's concerns regarding compactness. Accordingly, certiorari review is premature.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR THE ISSUANCE OF A WRIT OF CERTIORARI, AS REQUIRED BY RULE 10 OF THE RULES OF THIS COURT.

A. The Tenth Circuit's Decision Does Not Require, Explicitly or *De Facto*, Proportional Representation.

The Petition claims that the Tenth Circuit decision requires proportional representation. Pet. at i and 8. There are two critical flaws in this argument. First, the State did not raise a proportional representation defense in the Tenth Circuit, not even in the papers seeking rehearing. Second, the decision itself nowhere suggests that proportional representation has been sought or is being implemented.

Respondents do not seek a "safe" or "supermajority" district; all they ask is a fair chance to elect an Hispanic candidate of choice. The Tenth Circuit merely ruled that Hispanics in HD 60 "do not presently have the same *fair* opportunity to elect representatives of their choice to the General Assembly." Pet. App. A-60 (emphasis in original). In fact, there is no evidence in the record that any Hispanic candidate of choice (of any race) has been elected from HD 60

since it was drawn to include the San Luis Valley, and the State does not claim otherwise. No Hispanic from the Valley has been elected to the legislature in nearly six decades. Thus, this case is not about proportional representation; it is about Hispanics at last having a fair opportunity to elect *a* representative of choice.

B. The Tenth Circuit Properly Applied the First *Gingles* Prong.

The Tenth Circuit did not hold that traditional districting principles are irrelevant to the first *Gingles* prong. *See* Pet. at 8. Rather, the court properly looked at whether the Hispanic *population* was sufficiently large and geographically compact to comprise a majority Hispanic single-member district. Pet. App. A-16, A-23 - 24. This is the test established by this Court in *Gingles*. 478 U.S. at 50. *See also Bush v. Vera*, 116 S. Ct. at 1971 (Kennedy, J., concurring).

Based on a comprehensive review of the applicable law and evidence, Pet. App. A-16 - 18, A-23 - 26, the court of appeals concluded that the Hispanic population was sufficiently large and compact and that a sufficiently compact district *could* be drawn. This conclusion was based on a number of factors. **First**, the court pointed out that there are several counties in the area that have large Hispanic populations; in fact, two counties in HD 60 have substantial Hispanic majorities (Costilla 76.8% and Conejos 59.9%), four other counties have Hispanic populations exceeding 40%, and one is at 38.6%. Pet. App. A-24; PX-34 at 138-39. In this connection, the State conceded before trial that "there are sufficient Hispanics residing in south central Colorado to form a majority in a State House District." Doc. no. 37.

Second, the Tenth Circuit observed that the Reapportionment Commission itself considered plans that

showed a sufficiently compact majority Hispanic district was feasible. For example, the Commission preliminarily proposed the Ventura Plan, which would have provided an Hispanic population of 48.8%. Pet. Apps. A-7, I-3; Resp. App. A. The Commission also considered a 50% map. Pet. App. I-3.

Third, Respondents presented three alternative plans with Hispanic voting age populations ranging from 50.03% to 54.8%, PX-59 at 22-25, one of which, Pet. App. E, was referred to below as Respondents' alternative district. The court of appeals compared the Respondents' alternative to Colorado HD 7, approved by the Reapportionment Commission, which extends a narrow corridor connecting the City of Denver and Denver International Airport. Pet. App. A-24 - 25; *see also* map attached as Resp. App. C. In fact, three current districts, including HD 7, are less compact than Respondents' alternative under the Reock Compactness test. PX-59 at 24. The Tenth Circuit also found that Respondents' alternative was non-objectionable in comparison to the districts this Court found "bizarre" in *Shaw II* and *Bush*. Pet. App. A-25.[5]

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[5] Contrary to the assertion in the Petition at 12, the Tenth Circuit did not hold that "no benchmark exists in a § 2 case." Rather, the court merely quoted from Justice Kennedy's plurality opinion in *Holder v. Hall*, 512 U.S. 874, 114 S. Ct. 2581, 2587 (1994), which distinguished between cases brought under § 5 of the Voting Rights Act and § 2 cases: "'The baseline for comparison is present by definition [in the text of § 5]; it is the existing status.' Because retrogression is not the inquiry in a § 2 case, 'a benchmark does not exist by definition in § 2 dilution cases.'" Pet. App. A-17 n.12 (quoting *Holder v. Hall*, 114 S. Ct. at 2587 (citation omitted)). Thus, the court of appeals merely made the unremarkable observation that the text of § 2 does not provide an explicit benchmark for geographic compactness. In any event, as noted in the text, the Tenth Circuit used as benchmarks other districts approved by the Reapportionment Commission and the districts condemned in *Shaw II* and *Bush*.

Significantly, Respondents had only "minimal time on the State's computer used to draw districts," Pet. App. A-25, and the evidence was undisputed at trial that a more compact district could be drawn if more time at the State's computer were permitted. Respondents' alternative deviates only .717% from the "ideal" population district, PX-59 at 23, well below the 5% deviation permitted by the Colorado constitution (art. V, § 46), and the 10% deviation that is presumptively constitutional under the fourteenth amendment, *Brown v. Thomson*, 462 U.S. 835, 842 (1983). Respondents' expert, Dr. Bardwell, testified without contradiction that, with the benefit of those greater tolerances and additional time, a remedial district could be drawn that would be dramatically more compact. Tr. at 228-30, 238-39.

Finally, the unique geography of south central Colorado makes this a problematic case for certiorari review of compactness issues. The vast distances involved, the rough mountain terrain, and the sparse population distinguish this case from others that have come before the Court or are likely to in the future. These factors also mandate that some people living in Colorado who are separated from each other by tall mountain ranges, winding roads, and thousands of square miles of open space must be lumped together within a single legislative district. For example, the population of the San Luis Valley is too small to comprise a 50,000-person legislative district by itself. Pet. App. A-7. Traditionally, therefore, parts of the Valley have been combined with all or parts of counties that can only be reached by crossing the Continental Divide or the Sangre de Cristos. *Id.*; Resp. App. B. Thus, in the 1968 and 1970 elections, the district that included Alamosa County in the Valley crossed the Sangre de Cristos to add Huerfano County and a large section of Pueblo County, and in 1972-80, the Valley county of Costilla was combined with Huerfano County and a jagged arm stretching to the outskirts of the City of Pueblo. *Id.* Respondents' alternative district follows those

precedents, but, unlike the current HD 60, it does not cross the Continental Divide.[6]

In sum, the Tenth Circuit was mindful of and considered traditional districting principles, as historically applied in this unique topography, when it concluded, consistent with this Court's guidance in *Gingles* and *Bush v. Vera*, that the Hispanic population in south central Colorado is sufficiently compact to comprise a majority in a legislative district.

C. The Tenth Circuit Considered and Rejected the State's Proffered Explanations for Racial Bloc Voting.

Contrary to the assertion in the Petition at 8, the Tenth Circuit did not hold that its analysis of bloc voting could not include a review of the alleged reasons for the different voting patterns of Hispanics and Anglos. Rather, the decision reflects thoughtful consideration of the State's proffered evidence attempting to explain away the uncontradicted fact that voting by Hispanics and Anglos in HD 60 is highly polarized. Pet. App. A-32 - 37.

For example, the court carefully evaluated the evidence presented in support of the State's contention that party affiliation is the primary determinant in voting behavior, and concluded it was wanting. If partisanship were the primary determining factor, then one would expect that Democrats, with more than 56% of registered voters and a more than 2 to 1 registration edge over Republicans, would regularly be elected

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[6] "[T]he Divide has a substantial effect on the distribution of Colorado's population. The geographic location and physical characteristics of the Divide must therefore be a realistic consideration in any redistricting plan." *Carstens v. Lamm*, 543 F. Supp. 68, 84 (D. Colo. 1982) (three-judge court).

in HD 60. *Id.* A-34 n.30.[7] Yet Republicans have won every election for the HD 60 seat since 1970. PX-8. The court also evaluated the State's partisanship argument in light of its expert's candid concession that "'in a 100% Anglo voting age population precinct, the Anglo candidate will receive a majority of the votes regardless of whether that candidate is a democrat or a republican.'" Pet. App. A-34.

The Tenth Circuit also considered the State's incumbency argument, but concluded that it also failed to explain away the obvious results of racial bloc voting in HD 60. The State's expert *predicted*[8] that an Hispanic Democrat, non-incumbent male would defeat an Anglo Republican, non-incumbent male. But the last two times such non-incumbents faced each other in HD 60 elections, the Anglo Republican, non-incumbent male won--in 1976, PX-8, and in 1982, the first time the entire San Luis Valley was included within HD 60, Pet. App. A-35 - 36. As the court of appeals concluded, "We believe, therefore, actual outcomes, not predictions of outcomes, provide a more appropriate test." Pet. App. A-36.

Thus, the Tenth Circuit considered the State's purported reasons for explaining away the results of racial bloc voting and found them unpersuasive. The State's real complaint is merely

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[7] These figures come from the Commission's Final Report, which also shows that HD 60 has the third highest Democratic registration in the entire state. PX-34 at 154-58.

[8] Rather than report actual election results, Dr. Zax merely made hypothetical predictions based on his examination of elections occurring in only two years. While some courts and judges have relied on multivariate regression analyses in voting rights cases, the proponents of such evidence have presented actual election results, rather than hypothetical predictions. *See, e.g., League of Latin American Citizens v. Clements* ("*LULAC*"), 999 F.2d 831, 878, 881-82, 885-86 (5th Cir. 1993) (tables showing specific election results), *cert. denied*, 510 U.S. 1071 (1994).

a quarrel with the court's evaluation of the specific evidence in this case.

D. The Court Did Not Refuse to Consider Elections in Which There Were No Hispanic Candidates.

The Petition at 25 incorrectly claims, "The Tenth Circuit accepted as conclusive a statistical analysis which was limited to elections which involved only contests between majority and minority candidates."

As previously noted, the court carefully considered all of the statistical evidence offered by the State and Respondents, as well as EDS, the Reapportionment Commission's consultant. Thus, the court examined the State's statistics, which relied primarily on elections in which there were no Hispanic candidates.[9] Pet. App. A-34 n.31. Moreover, Respondents did in fact present evidence of elections in which no Hispanic candidate ran--elections in which Congressman Campbell participated and the ballot initiative on the English-only Amendment. *Id.* A-31.

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[9] The State's expert made no case-by-case determination of whether a candidate of choice of the Hispanic community was running. Rather, in each election, he merely assumed that the Democratic candidate was the Hispanic candidate of choice. Pet. App. P-8 - 10. That blunderbuss approach deviates from the law of the Tenth Circuit, *Sanchez v. Bond*, 875 F.2d 1488, 1495, (10th Cir. 1989), *cert. denied*, 498 U.S. 937 (1990), and of other circuits, *Jenkins v. Red Clay Consolidated School District Board of Education*, 4 F.3d 1103, 1126 (3d Cir. 1993) (requiring proof on an election-by-election basis, by a preponderance of the evidence, which candidates are minority preferred), *cert. denied*, 114 S. Ct. 2779 (1994); *Collins v. City of Norfolk*, 883 F.2d 1232, 1238 (4th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990); *Harvell v. Blytheville School District #5*, 71 F.3d 1382, 1386 (8th Cir. 1995) (minority candidate of choice "must be established on an election-specific basis"), *cert. denied*, 116 S. Ct. 1876 (1996). Respondents' expert, on the other hand, verified in each instance whether the Hispanic candidate was the Hispanic candidate of choice. Pet. App. A-30.

Significantly, the State did not object to the admission of Respondents' statistical evidence. Its objection to that evidence at this late stage can only go to evaluating its weight, which is hardly a basis for invoking this Court's certiorari jurisdiction.

E. The Court of Appeals Engaged in a Comprehensive Canvassing of the Totality of the Circumstances.

The State's contention that the Tenth Circuit failed comprehensively to canvass all of the relevant totality-of-circumstances factors does not survive a reading of the decision itself.

At the outset of its legal analysis, the Tenth Circuit made the following observations regarding this Court's approach toward the totality of circumstances:

> Under *[Johnson v.] DeGrandy*, [512 U.S. 997 (1994),] a court's examination of relevant circumstances is not complete "once the three factors were found to exist or in the sense that the three in combination necessarily and in all circumstances demonstrated dilution." *Id.* This is so "because the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on *comprehensive, not limited, canvassing of relevant facts*." *Id.*

Pet. App. A-15 (emphasis added). After addressing in detail each of the three *Gingles* factors, the court turned to a detailed discussion of the totality of circumstances in a separate section with that heading. *Id.* A-42 - 53. At the beginning of this section, the court again emphasized the comprehensive nature of its task:

> "[T]he ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on *comprehensive, not limited, canvassing of relevant facts.*" *DeGrandy*, --- U.S. at ---, 114 S. Ct. at 2657.

Pet. App. A-43 (emphasis added).

The court then discussed each of the factors referred to by the district court in its totality-of-circumstances analysis, but in considerably more detail. The Tenth Circuit's totality-of-circumstances discussion occupies 12 pages in the State's Appendix (not including the 16-page discussion of racially-polarized voting at A-26 - 41), while the district court's discussion occupies only 6 pages. *Compare* Pet. App. A-42 - 53 with Pet. App. B-23 - 29. Moreover, five of the six factors listed in the Petition at 18-19 were explicitly considered by the Tenth Circuit.[10] The remaining factor--the future impact of a recent Colorado constitutional amendment on term limits--was not addressed by the Tenth Circuit for the simple reason that it was not raised by the State in that court.

The Tenth Circuit's decision properly recognized that the most important factors in the totality-of-circumstances analysis are the existence of racially-polarized voting and the lack of Hispanic electoral success. Pet. App. A-42, A-53. That is what this Court said in *Gingles*, 478 U.S. at 48 n.15. While the State claims that principle was stated in a plurality opinion in

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[10] The factors listed by the State are discussed in the Tenth Circuit decision (Pet. App. A) at the following pages: (1) single district in 1982: A-7, A-35 - 36; 5% increase: A-52; (2) appointments: A-48 - 49; (4) exogenous elections: A-49; (5) voter registration increase: A-47; and (6) partisanship: A-32 - 36.

Gingles, its math is faulty.[11] The Tenth Circuit's citation to *Gingles* appears in Part II-B of the opinion of Justice Brennan, who delivered the opinion of the Court with respect to Parts I, II, III-A, III-B, IV-A, and V. Four other Justices joined those portions of his opinion. *Id.* at 33, 82.

This Court's decision in *DeGrandy* did not diminish the importance of those factors. The § 2 claim in that case failed for the very reason that the minority group had achieved substantial electoral success: "One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast." 512 U.S. at ___, 114 S. Ct. at 2660. The present case, however, does involve a political famine, during which "an Hispanic has not been elected to this particular office since 1940." Pet. App. A-49.[12]

The importance of racially-polarized voting and lack of minority electoral success in the totality-of-circumstances analysis has been recognized by most circuits. *Uno v. City of Holyoke*, 72 F.3d 973, 980-83 (1st Cir. 1995); *Jenkins v. Red Clay Consolidated School District Board of Education*, 4 F.3d 1103, 1135 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 2779 (1993); *Clark v. Calhoun County*, 88 F.3d 1393, 1397 (5th Cir. 1996);

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[11] The State's miscounting undermines its reliance on *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (*en banc*), *cert. denied*, 115 S. Ct. 1795 (1995), at two places. Pet. at 22, 24. In both instances, the State relies on an opinion joined in by only two judges out of eight. 39 F.3d at 1547.

[12] The State's claim that Hispanics won more than 60% of the exogenous elections in HD 60 analyzed by Respondents' expert omits a critical fact: most of the Hispanic wins came in Costilla and Conejos Counties, the only counties in HD 60 where Hispanics enjoy actual majorities. PX-59. The fact that Hispanics are able to elect candidates of choice when they are in the majority (but only rarely when they are in the minority) merely underscores the conclusion of legally-significant racial bloc voting in HD 60.

Harvell v. Blytheville School District #5, 71 F.3d 1382, 1390 (8th Cir. 1995) (*en banc*) ("[t]he two primary factors considered in our totality analysis are the extent to which voting is racially polarized and the extent to which minorities have been elected under the challenged scheme"), *cert. denied*, 116 S. Ct. 1876 (1996). No circuit has indicated that a different approach should apply to single-member district cases. To the contrary, the Fifth Circuit in *Clark* recently held in a single-member districting case that "the existence of racially-polarized voting and the extent to which minorities are elected to public office remain the two most important factors considered in the totality-of-circumstances inquiry." 88 F.3d at 1397.

In sum, the State merely seeks to relitigate in this Court each of the totality factors in the circumstances of this particular case. Certiorari is not a proper means for challenging the misapplication of a properly stated rule of law. SUP. CT. R. 10.[13]

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[13] Whether the Tenth Circuit should have remanded the case to the district court for further findings is not an appropriate question for certiorari review. The governing statute grants the appellate court discretion to "reverse any judgment" or to "remand the cause and *direct the entry* of such appropriate proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106 (emphasis added). Several appellate courts reviewing § 2 cases have entered orders reversing the district court and directing entry of judgment without remanding for additional findings of fact. *See Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988) (reversing trial court's dismissal of § 2 claim without remanding for further findings), *cert. denied*, 498 U.S. 1080 (1989); *Collins v. City of Norfolk*, 883 F.2d 1232 (same); *Clark v. Calhoun County*, 88 F.3d 1393 (same); *LULAC*, 999 F.2d 831 (reversing a district court's finding of a § 2 violation without remanding for further proceedings).

II. THE CASE IS NOT RIPE FOR CERTIORARI REVIEW BY THIS COURT BECAUSE A FINAL JUDGMENT HAS NOT YET BEEN ISSUED AND THE ONGOING PROCEEDINGS IN THE DISTRICT COURT COULD MOOT ISSUES RAISED IN THE PETITION.

The Tenth Circuit's decision is interlocutory in nature, and therefore, review by this Court of the pending litigation is premature. The Tenth Circuit remanded the case to the district court and directed it to "order the State to implement a remedial plan of redistricting consistent" with the Tenth Circuit's opinion and § 2 of the Voting Rights Act. Pet. App. A-60. As a result of that remand,[14] the remedial portion of this litigation is not yet decided, and thus, the case is not final and ripe for review by this Court.

This Court "generally awaits final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Institute, et al. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring) (citing *American Construction Co. v. Jacksonville, T& K. W.R. Co.*, 148 U.S. 372, 384 (1893)); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328, (1967) (*per curiam*); and R. Stern, E. Gressman, & S. Shapiro, SUPREME COURT PRACTICE § 4.18, pp. 195-198 (7th ed. 1986)). Absence of finality in a judgment "of itself alone" is "sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Review of this case at this juncture is therefore premature. The remedial plan to be developed by the State may resolve

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[14] This Court denied the State's Application to Stay Mandate. *Colorado v. Sanchez*, 117 S. Ct. 678 (Dec. 30, 1996).

some or all of its concerns regarding compactness. Thus, denial of the Petition will ensure a complete record and eliminate all claims mooted by the new reapportionment plan.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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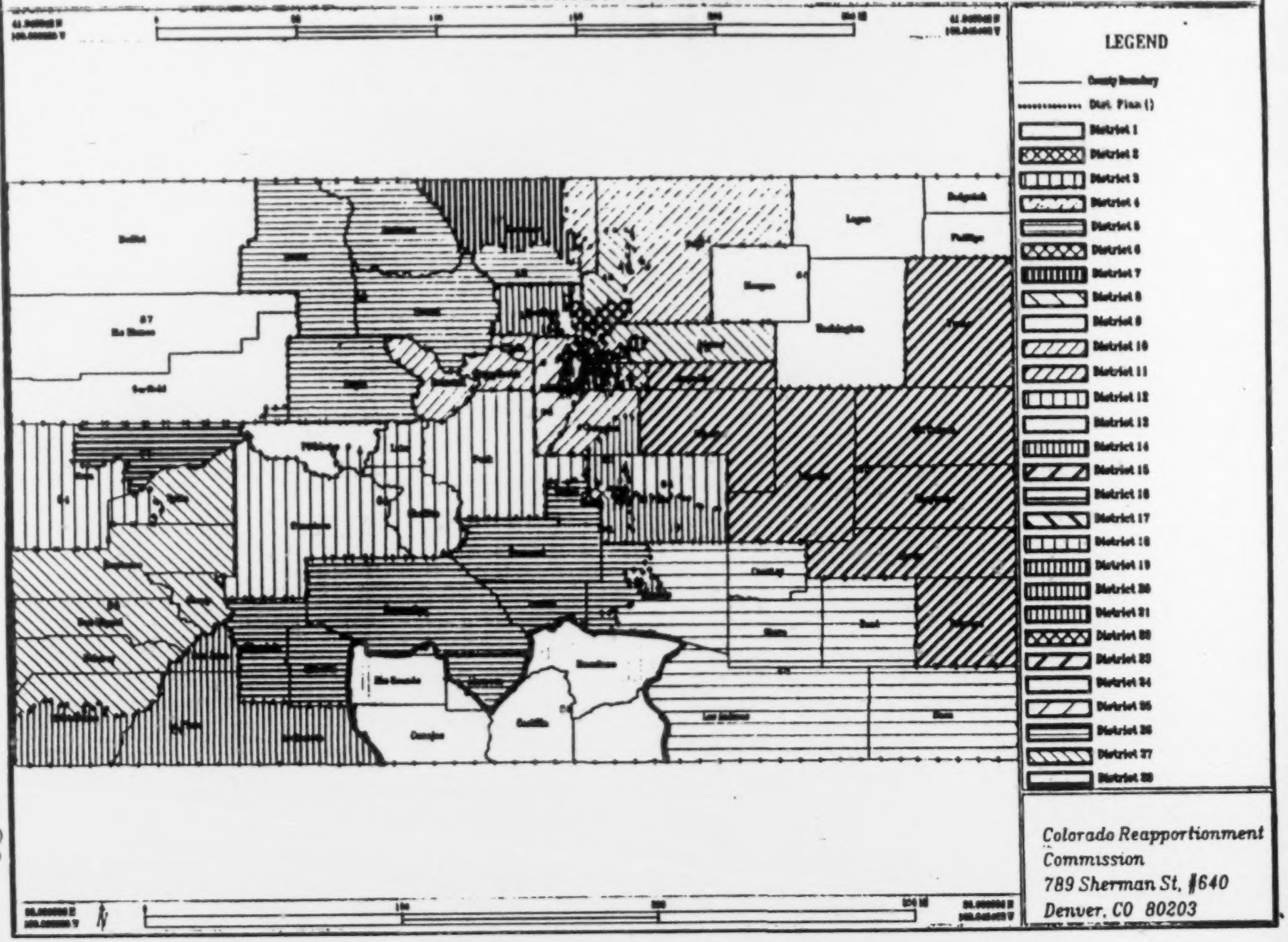
Attorneys for Respondents

April 10, 1997

APPENDIX A

Colorado Reapportionment Commission
PRELIMINARY PLAN
STATE HOUSE DISTRICTS

October 28, 1991



Colorado Reapportionment Commission
789 Sherman St, #640
Denver, CO 80203

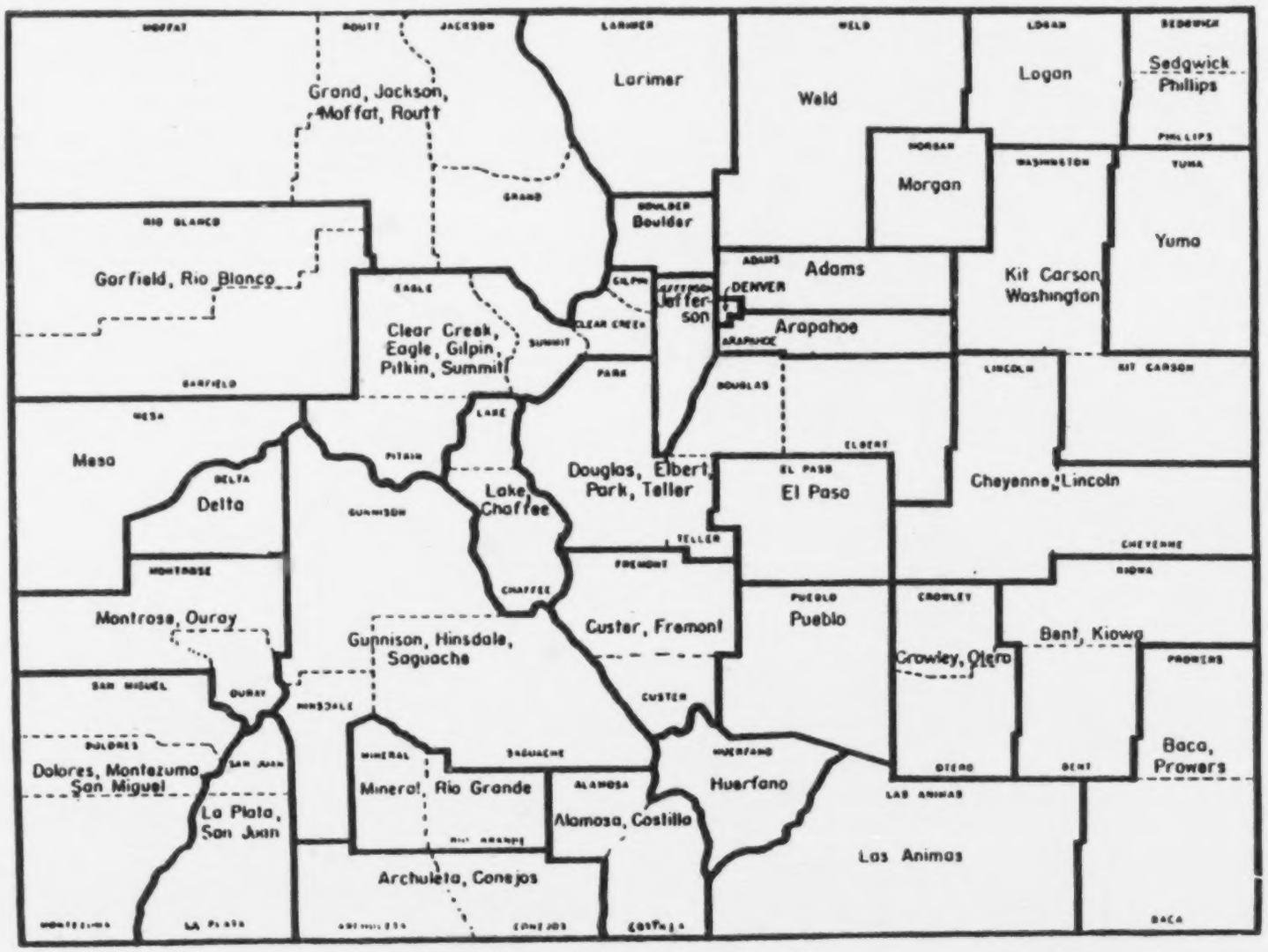
MAP - 1

b22207

APPENDIX B-1

Colorado State House Districts 1934-1962 Elections

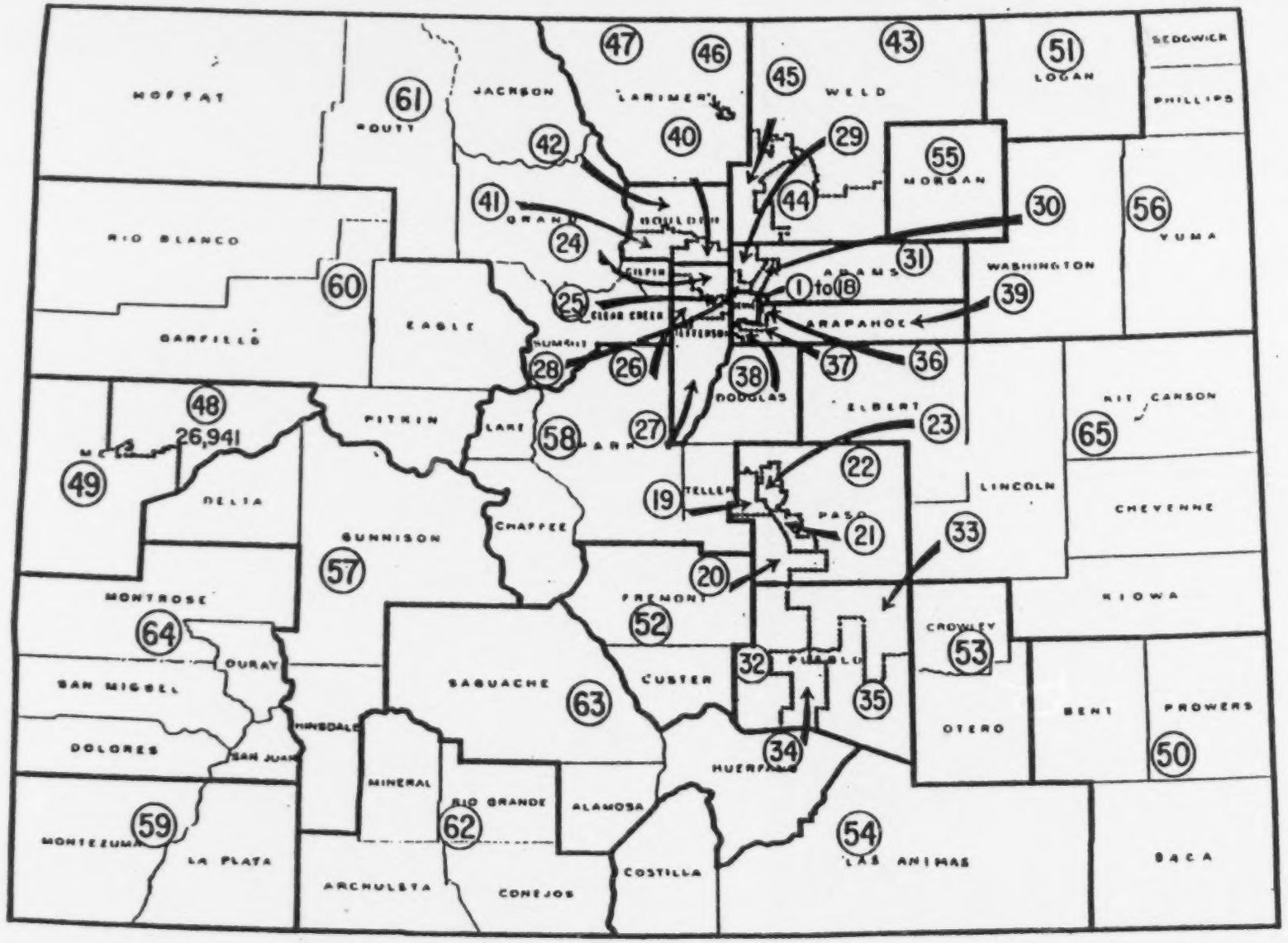
Alamosa, Conejos, Costilla, Huerfano, Las Animas, Mineral, Pueblo, Rio Grande and Saguache



APPENDIX B-2

Colorado State House Districts 1964-1966 Elections

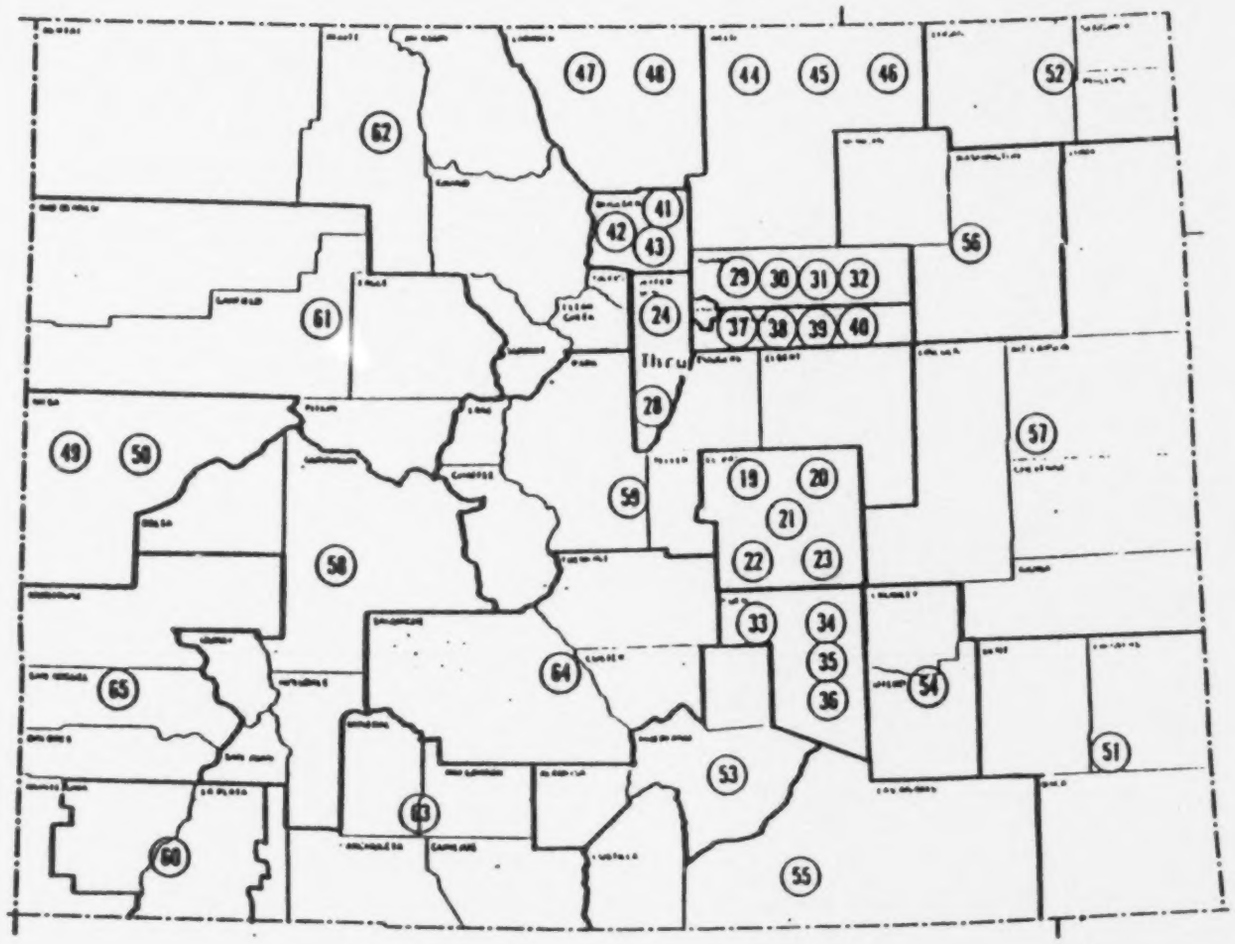
Alamosa, Conejos, Costilla, Huerfano, Las Animas, Mineral, Pueblo, Rio Grande and Saguache



APPENDIX B-3

Colorado State House Districts 1968-1970 Elections

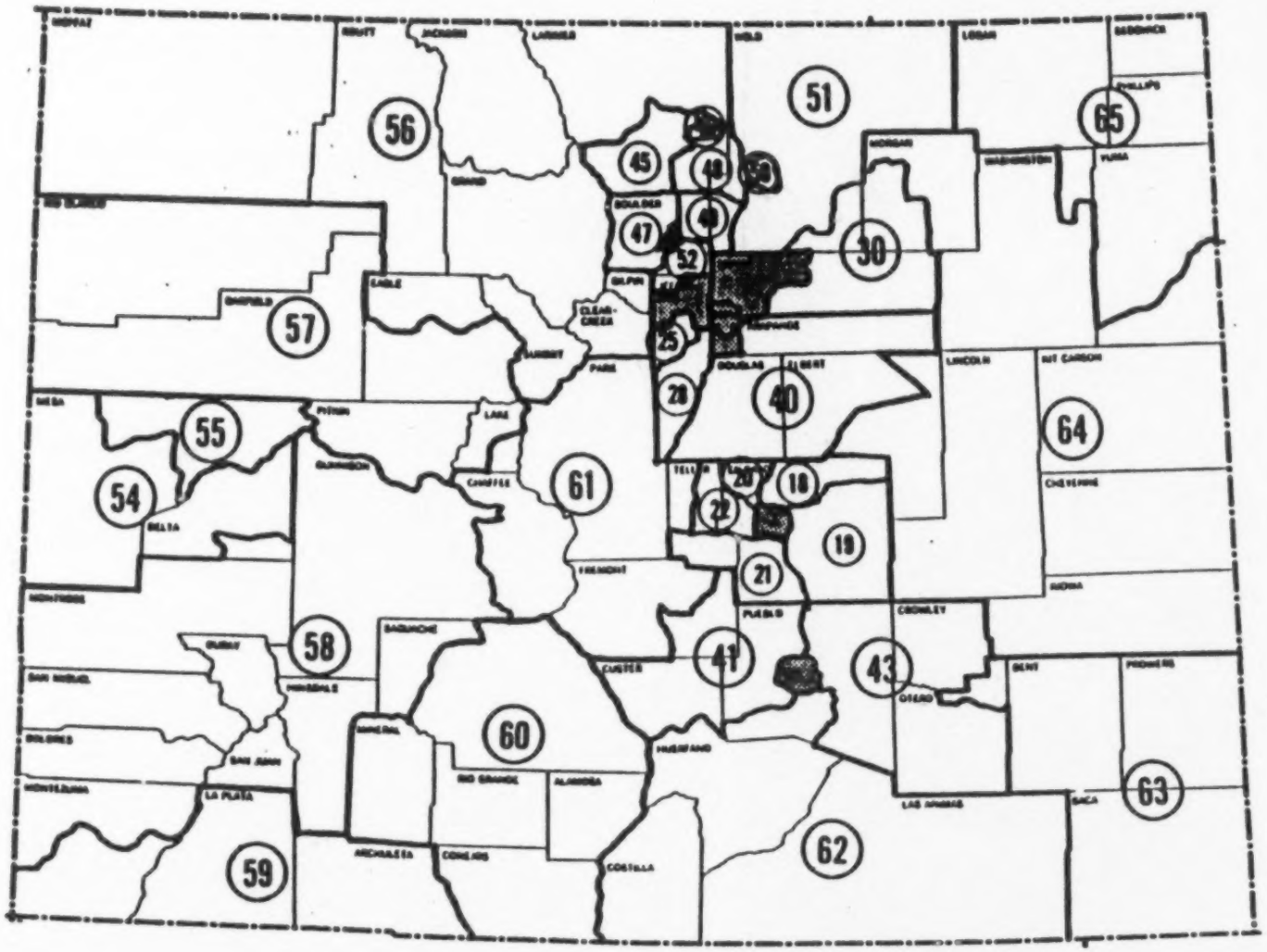
Alamosa, Conejos, Costilla, Huerfano, Las Animas, Mineral, Pueblo, Rio Grande and Saguache



APPENDIX B-4

Colorado State House Districts 1972-1980 Elections

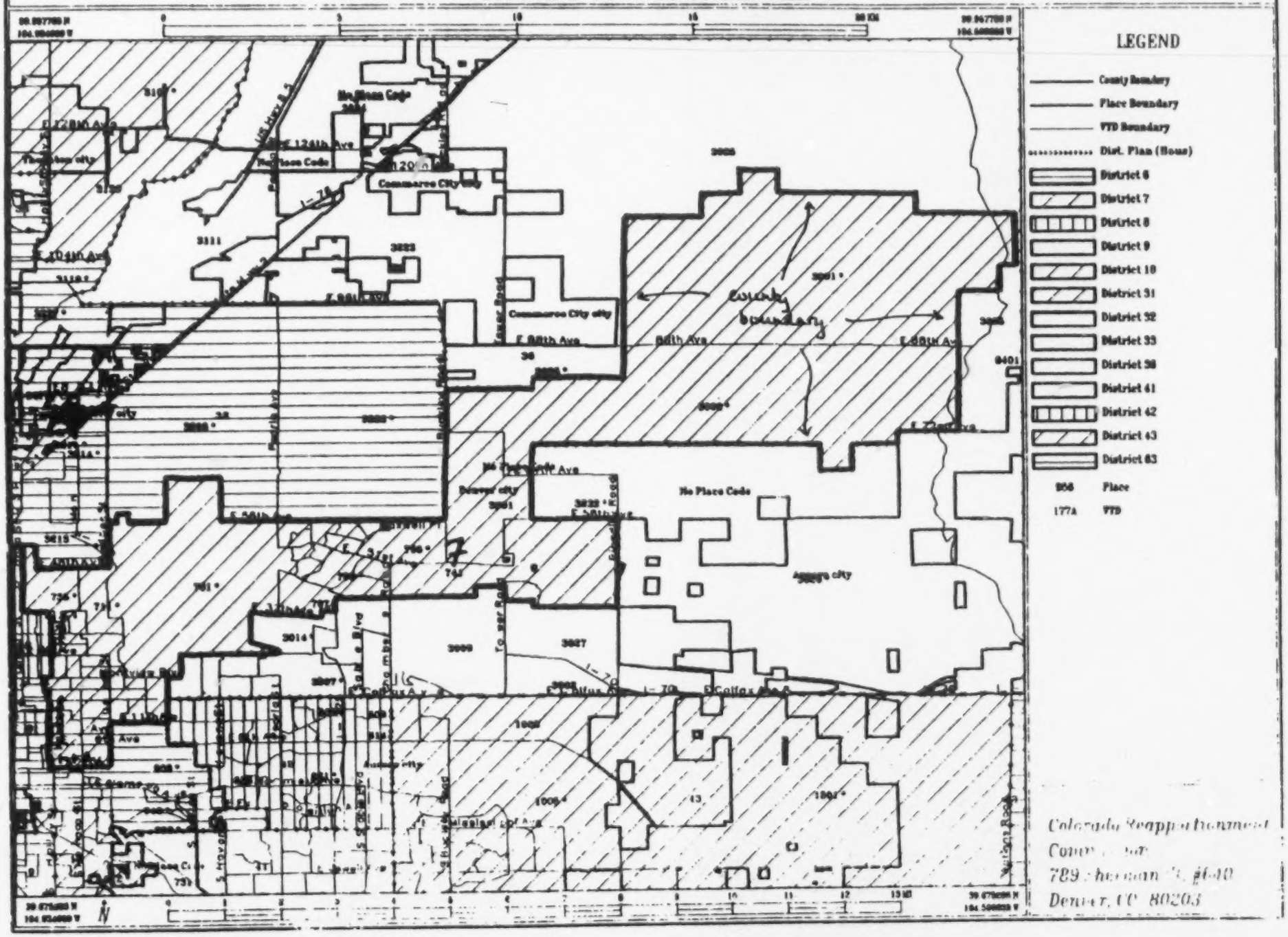
Alamosa, Conejos, Costilla, Huerfano, Las Animas, Mineral, Pueblo, Rio Grande and Saguache



APPENDIX C-1

Colorado Reapportionment Commission
FINAL HOUSE PLAN – DISTRICT 7
CITY AND COUNTY OF DENVER

April 28, 1992

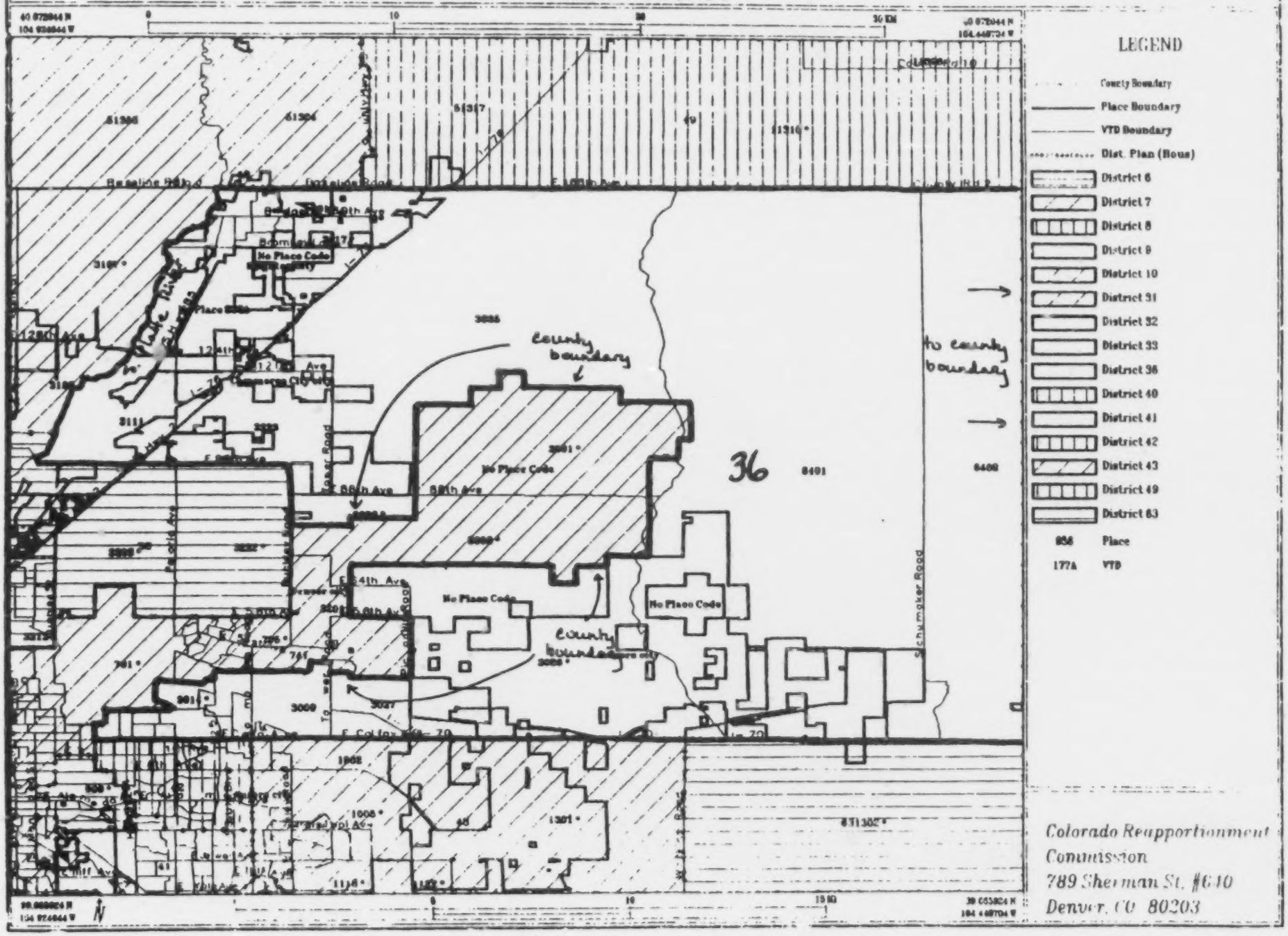


House Map 5

APPENDIX C-2

Colorado Reapportionment Commission
FINAL HOUSE PLAN – DISTRICT 36
ADAMS COUNTY

April 28, 1992



House Map 18